STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	**)**	
On its Own Motion	**)**	
	)	
Audit of Just Energy Illinois Corp.	**)**	**Docket No. 10-0398**
d/b/a Just Energy d/b/a	**)**	
U.S. Energy Savings Corp.	**)**	

CITIZENS UTILITY BOARD'S VERIFIED RESPONSE TO THE MOTION TO JUST ENERGY ILLINOIS CORP. TO MAINTAIN CONFIDENTIAL TREATMENT

THE CITIZENS UTILITY BOARD ("CUB"), through its attorneys, pursuant to 83 Ill. Admin Code § 200.520(a), and the schedule in the Administrative Law Judge's ("ALJs") May 11, 2012 Ruling, hereby files this response to Just Energy Illinois Corp.'s Motion to Maintain Confidential Treatment of Confidential Portions of the January 3, 2012 Audit Report, ("Motion"), filed on May 10, 2012. The Motion should be denied for the reasons stated herein.

I. INTRODUCTION

The genesis of the instant proceeding is a Complaint filed by CUB and AARP against Just Energy Illinois Corp. ("Just Energy," "JE," or the "Company," formerly known as Illinois Energy Savings Corp. d/b/a U.S. Energy Savings Corp. ("USESC")) in March 2008. *Citizens Utility Board and AARP vs. Illinois Energy Savings Corp. d/b/a U.S. Energy Savings Corp*., ICC Docket No. 08-0175 ("*CUB Complaint*"). In its final Order ("Order") in the *CUB Complaint*, the Commission found several violations of Title IX of the Public Utilities Act, (220 ILCS 5/19-115(c) and 19-115(f)), relating to Just Energy's fraudulent sales activity and use of misleading marketing materials. In addition to fines, the Commission ordered a comprehensive management audit of Just Energy. *CUB Complaint*, Final Order at 49 (April 13, 2010). On June 23, 2010, the

Commission opened the instant docket, the purpose of which ~~purpose~~ is to govern the procedure and conduct of the Audit. The Audit was conducted from May through October 2011, and the redacted version of the Compliance Audit and Management Assessment of the Business and Sales Practices of Just Energy ("Audit Report") was filed on e-Docket on January 3, 2012, the public version of which contained substantial redactions of confidentially-designated material. The Commission approved CUB's proposed Order Regarding Protection of Confidential Information ("Protective Order") on April 4, 2012.

On May 1, 2012, in accordance with the procedure outlined in the applicable and controlling Protective Order, CUB served Just Energy with its letter of objection to the designation of certain information in the Audit Report as confidential or proprietary, information that was redacted from the public report. CUB did not challenge each of the Company's designations in the Audit Report, despite the fact that it would have been arguably reasonable to do so, considering the Audit Report is the culmination of a Commission-ordered audit, which was a remedy for several violations of Title IX, the AGSA. Rather, CUB carefully examined each word or phrase designated as confidential, using the definition of "confidential" in the Protective Order and established Illinois law as a guide, and limited it objections only to information that clearly fails to meet these parameters.

The Protective Order entered in this proceeding provides that the proponent of the confidentially-designated information must submit a written request for Confidential or Confidential and Proprietary Treatment within 7 business days of receipt of a notice of objection, if the parties cannot informally resolve the issues in the objection. Protective Order, Para. 6. Just Energy filed its Motion on May 10, 2012. In its Motion, Just Energy offered to de-designate just 6 pieces of information in the Audit Report, two of which are the location of its customer

call center, which is publicly revealed on its website. The Company can hardly be championed for de-designating this information. Indeed, the fact that it designated this publicly-available fact in the first place casts a dark shadow over the authenticity of its designations generally.

Just Energy's Motion fails to meet the high burden under Illinois law to withhold information from the public record and therefore much of its request for confidential protection should be denied. As an general matter, Commission policy favors public access to its records, 83 Ill. Adm. Code 200.25, 200.340, and 200.530; *see also* 220 ILCS 5/10-101, and Commission rulings on the matter have shown a preference for ensuring the most complete public record is compiled. Based on the definition of "confidential" in the Protective Order, Illinois law favoring public access to judicial documents, and previous Commission determinations as to improperly designated material in the underlying proceeding (ICC Docket No. 08-0175), much of what the Company has designated as confidential in the Audit Report is improperly designated as such and should be made public.

This Response will discuss the legal standards for determining what information meets the threshold under Illinois law to justify withholding information from the public record and apply the law to the particular categories of information for which Just Energy seeks protection. The Protective Order maintains that Just Energy bears the burden of showing that the material should remain secret from the public. Protective Order at ¶ 6; 220.

The thrust of CUB's objections to certain confidential designations is that the material fails to meet the standard articulated in the Protective Order and under Illinois law generally. Many of CUB's objections are grounded in the Commission's prior rulings regarding Just Energy's business information in the case in which the Audit at issue in this docket was ordered, the *CUB Complaint*. In that case, as here, the Company designated copious information

confidential, even where some of that information was already publicly released on the Company's website or had been previously publicly discussed. The Company further designated, as here, extremely general information about training of its independent contractor sales agents and verification processes, the revelation of which to a competitor could provide no undue advantage. The Commission previously determined that these categories, and others discussed below, did not warrant confidential protection. Additionally, in the *CUB Complaint*, the Commission considered and rejected Just Energy's request for confidential status of certain material several times.

The Company has been subject to significant litigation regarding its sales and marketing efforts in Illinois, as noted by the Commission in the *CUB Complaint* Order:

> Here, despite whatever measures were in place before and during the relevant time frame, USESC generated a complaint volume in excess of other AGSs, as well as significant litigation. In addition to the 2006 CUB complaint and the instant case, Respondent was also sued by the Illinois Attorney General in the Circuit Court, on February 2, 2008, for alleged violations of the CFA36. USESC Ex. 5.14. The company voluntarily settled that case without admission of violation, agreeing to, *inter alia*, an extensive list of controls on its door-to-door sales and service authorizations. *Id*. It also established a one-million dollar settlement fund. *Id*. Additionally, in late 2006, Respondent entered into an agreement with the Department of Consumer Services of the City of Chicago, and made a financial payment "as a result of consumer complaints about deceptive door-to-door sales techniques." CUB Ex. 1.1 at 5. Respondent"s compliance management was plainly inadequate to the task of precluding adverse consequences for itself and the public during the relevant time frame.

CUB Complaint, Order at 18. It is important to recognize the context of the Company's history in Illinois for two central reasons. First, the Company has subjected itself to significant scrutiny by the Attorney General, City of Chicago, and this Commission. As a result of these proceedings, Just Energy is required to implement certain remedial measures to bring itself into

compliance with the law. Any actions that are required by virtue of public orders or stipulations should be transparent to the public. Second, it would not be rational for a competitor to mimic the business practices of a Company with significant allegations and litigation against it – especially when the business practices the Company seeks to shield from those competitors were at issue in that litigation.

In its May 1, 2012 letter to the Company, CUB included a table with each piece of challenged information and the general reason for the challenge, as required by the Protective Order[1]. Protective Order at ¶ 6. Because CUB had already identified the nature of its objections to each piece of designated information in a table in its May 1, 2012 letter, and the table in the Company's Confidential Attachment A appears to be accurately represented, CUB does not attempt to further elaborate on the justifications for publicizing the referenced information in table form in this Response. Rather, CUB focuses on describing the prescriptions under Illinois law governing what is properly considered "trade secret," and how those legal parameters apply to the categories of information identified by the Company in its Motion and its Confidential Attachment A. Additionally, with this response, CUB has provided the ALJ with a version of the Audit Report that highlights all of the information designated by the Company as confidential, because the Company's confidential version of the Audit Report does not designate which information is allegedly confidential. (CUB Attachment A)

[1] Under the unambiguous provisions of the Protective Order, the Company was required to work in good faith with CUB to negotiate a satisfactory resolution, and if one was not reached, the Company was obligated to file a motion within 7 business days of the notice of objection (which was May 10, 2012). *Id*. The Company contacted CUB regarding the May 1, 2012 letter on May 5th, but did not have a substantive response to CUB's objections at that time. Instead, the Company scheduled a call for the following week, May 9, 2012. On May 9th, the Company indicated that it could not participate on the scheduled call due to other pending matters and suggested a meeting on May 10, 2012, the day its Motion seeking confidential treatment was due. CUB offered to meet if there was anything of substance to discuss; however, it was clear to CUB that waiting until the day a Motion was due to begin negotiations on this matter did not constitute good faith on the Company's part.

II. ARGUMENT

A. THE COMMISSION FAVORS OPEN ACCESS TO COMMISSION RECORDS

This Commission has repeatedly confirmed its policy favoring public access to its records. Most significantly, in the *CUB Complaint*, the Commission has already had the opportunity to address whether certain categories of information regarding Just Energy's business warrant confidential treatment. Taking well-established Commission policy, Illinois law and prior Commission rulings on the confidential nature of the Company's business information together, the Commission has sufficient basis on which to rest its conclusions that no competitive harm or disadvantage will come to Just Energy if the pieces of information objected to by CUB are placed into the public realm. An overview of Illinois law on this matter – as well as prior Commission rulings on Just Energy's business information – is discussed below.

1. Legal Standard

Illinois law requires that Commission proceedings be conducted as open proceedings. In particular, the Public Utilities Act directs the Commission to conduct open proceedings: "**all** proceedings of the Commission and **all** documents and records in its possession shall be public records." 220 ILCS 5/10-101 (emphasis added). That legislative mandate is repeated and reinforced by the ICC's Rules of Practice: "**all** proceedings of the Commission shall be open to the public." *See* 83 Ill. Adm. Code 200.530 (emphasis added). The General Assembly clearly contemplated that the Commission's proceedings would be public. Public proceedings enable the public to inform itself about the issues before the Commission and build confidence in the integrity of the Commission's performance. Sealed proceedings, in contrast, contravene the express intent of the General Assembly, deprive the public of information, and engender cynicism about the regulatory process.

Pursuant to Section 4-404 of the Public Utilities Act ("Act"), 220 ILCS 5/4-404, and Section 200.430 of the Rules of Practice of the Illinois Commerce Commission ("Commission"), 83 Ill. Admin. Code § 200.430, a protective order can be entered to govern the treatment of allegedly confidential information, as has been done here. However, the PUA, the Commission's Administrative Rules and Illinois law favor public access to judicial records, including Commission proceedings, and place the burden for demonstrating the need for restriction of public access to such information squarely on the requesting party. *See In Re the Marriage of Johnson*, 232 III. App. 3d 1068, at 1072-73; *see also* 83 Ill. Adm. Code 200.25, 200.340, and 200.530; *see also* 220 ILCS 5/10-101.

First and foremost, the Commission must look to the Protective Order entered in this proceeding, which governs the treatment of allegedly confidential material, to assist it in determining whether information designated as confidential deserves such extraordinary treatment. The operative Protective Order in this proceeding defines "confidential" as:

> "Confidential," or "Confidential Information" as used herein is non-public information maintained by a party in confidence in the ordinary course of business, to the extent that it contains trade secrets, commercial information, proprietary information, or financial information where disclosure of such information may cause competitive harm. It also includes such other categories of documents and information as are recognized as confidential under applicable law or by order of the Administrative Law Judges or the Commission in this Docket. Nothing shall be considered confidential if it has been publicly disclosed previously or lawfully received from other sources.

Protective Order, ¶ 4. In interpreting this exact language, the Commission previously defined "competitive harm as the award of unequal advantage to a competitor through disclosure." *CUB Complaint*, January 6, 2009 Administrative Law Judge's Ruling at 2. The Commission made clear that "the purpose of confidentiality during Commission litigation is not to preclude

competitors from studying practices designed to yield customer benefit. Rather, it is to avoid creating competitive disadvantage for litigants." *Id*. It is with this articulated standard that the Commission should begin its analysis.

Beyond the confines of the Protective Order, the Commission can also look to established Illinois law regarding the standards for the proper designation of confidential information. *Cass Long Distance Services, Inc. and Cass Telephone Company, Petition for emergency relief to protect Petitioner's Annual Report from disclosure for not less than 5 years in order to protect highly proprietary information*, Docket No. 98.0060 (March 10, 1999) ("Cass"). In *Cass*, the Commission adopted the analysis and application of federal Freedom of Information Act ("FOIA") case law. *Id*. The Commission held that, in considering whether information should be treated as confidential, the proper focus is not on how the information has been treated historically, but on the potential effect that disclosure of the information is likely to have. *Id*. at 41. The *Cass* Order involved a claim against the Commission, consisting of a request to hold an Annual Report in confidence rather than make it publicly available. While *Cass* did not involve a FOIA request, the Commission nonetheless accepted a relevant analysis based upon state and federal FOIA law, and created a standard for the designation of confidential and proprietary information. The Commission rejected the argument that the customary characterization of the information should dictate its decision to grant proprietary treatment and instead adopted an objective standard to determine which information deserves proprietary or confidential treatment[2]. *Id*. at 42.

[2] Just Energy is a competitive alternative gas supplier and is regulated by the Commission and thus the Company must align its business activities with the requirements under the PUA, as well as Illinois law. Therefore, the factual predicate of the analysis remains the same as in *Cass*.

FOIA is based upon the policy that the public must be given complete access to information "regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees." 5 ILCS 140/1. As with established Illinois case law, in FOIA cases, the burden rests with the agency seeking to avoid disclosure to demonstrate that the requested information falls within one of FOIA's narrowly-construed exemptions. *Cooper v. Department of the Lottery*, 266 Ill.App.3d 1007, 1012 (1994). The Federal Freedom of Information Act (5 U.S.C. § 552) was the model for the Illinois FOIA (see *Cooper*, 266 Ill. App. 3d at 1012). The *Cass* Order quoted the public policy underlying the Illinois FOIA:

> Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.

Cass Order at 4-5, 5 ILCS 140/1. The exception to public disclosure that was relevant in *Cass* and is relevant here reads:

> (1) The following shall be exempt from inspection and copying:
> (g) Trade secrets and commercial or financial information obtained from a person or business where the trade secrets or information are proprietary, privileged or confidential, or where disclosure of the trade secrets or information may cause competitive harm … Nothing contained in this paragraph (g) shall be construed to prevent a person or business from consenting to disclosure.

Cass Order at 4-5, citing 5 ILCS 140/7(1)(g). The Illinois legislature declared that the federal courts' interpretation of the federal FOIA proprietary treatment exemption is to be used when

applying Section 7(1)(g) of the Illinois FOIA. *Cooper* at 1014, *citing* Debates in the Illinois House of Representatives 83rd General Assembly (May 25, 1983) at 184. Furthermore, the Illinois Supreme Court has held that the exemptions to FOIA should be read narrowly. *Bowie v. Evanston Community Consol. Sch. Dist.*, 128 Ill.3d 373, 378 (1989).

In *Cass*, the Commission adopted two tests used in federal case law to determine whether information falls into the exception under Section 7(1)(g): the impairment test and competitive harm test. *Cass* Order at 31-37, 41. The federal cases hold that for information to be considered confidential and exempt from disclosure, disclosure must either (1) be likely to impair the public body's ability to obtain necessary information in the future ("impairment test"), or (2) be "likely to cause substantial harm to the competitive position of the person from whom the information was obtained" ("competitive harm test"). *Cass* Order at 32-37. Here, Just Energy is regulated by the Commission and must comply with certain requirements under the PUA in order to obtain and retain its certificate of service authority and to continue to do business in Illinois.

The Commission also adopted the competitive harm test, which was developed by the D.C. District Court in *National Parks and Conservation Assoc. v. Morton*, 498 F.2d 765, 770 (1974). Under the competitive harm test, the party requesting confidentiality may not merely note a minor impact on its competitive position – it must show by specific factual or evidentiary material that: (1) the entity from which the information was obtained actually faces competition; and (2) substantial harm to a competitive position would likely result from disclosure of the information. Using the standards expressed in the *Cass* Order, JE must satisfy both prongs of this test to justify withholding the designated material from the public record. *Cass* Order at 42.

To meet the second prong of this test, JE must show "by specific factual or evidentiary material" that it actually faces competition and that "substantial harm to a competitive position

would likely result from disclosure of the information…" *Cass* Order at 13, *quoting Calhoun v. Lyng*, 864 F.2d 34, 36 (5th Cir. 1988); *Cooper v. Department of the Lottery*, 266 IllApp.3d 1007 (1994). The need for specific factual or evidentiary information to support an allegation of competitive harm is well-recognized. *Cooper* at 1302 ("To meet this burden and to assist the court in making its determination, the agency must provide a detailed justification for its claim of exemption, addressing the requested documents specifically and in a manner allowing for adequate adversary testing.") In order to establish "good cause" for maintaining confidentiality of information under a protective order, the proponent must present "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Calhoun v. Lying*, 864 F.2d 34, 36 (5th Cir. 1988)); *see also In re Bank One Securities Litig.*, 222 F.R.D. 582, 586 (N.D. Ill. 2004). In *National Parks and Conservation Assoc. v. Kleppe*, the D.C. Circuit court stated that "[c]onclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA, since such allegations necessarily elude the beneficial scrutiny of adversary proceedings, prevent adequate appellate review and generally frustrate the fair assertion of rights under the Act." 547 F.2d 673, (D.C. Cir. 1976).

In lieu of the required evidentiary showing for a determination that the challenged documents are exempt from public disclosure, Just Energy offers only unelaborated and unsupported assertions, which are patently insufficient to meet its burden. *See Cass* at 33; *see also Union Oil Co. of Ca. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) ("Calling a settlement confidential does not make it a trade secret, any more than calling an executive's salary confidential would require a judge to close proceedings if a dispute erupted about payment (or termination).") As a regulated entity, Just Energy should be aware that it bears a heavy burden

to overcome the presumption that information central to Commission proceedings is available to the public. Just Energy may only operate its business in the State of Illinois if it meets and continues to comply with the requirements in Title IX of the PUA. As a regulated entity, a status Just Energy maintains voluntarily, the Company is fully aware of the applicable Commission disclosure and oversight requirements. More importantly, however, the Commission directed this audit to be conducted under the state procurement process as a remedial measure for several violations of law, and further required that the Company cooperate fully and in good faith with the auditor to provide complete access to its books, records, offices and staff. *CUB Complaint*, Final Order at 49. The Company's failure to specifically describe what competitive harm would result if the challenged information was publicized falls miserably short of its burden to provide specific demonstrations of fact.

2. APPLICABILITY OF PRIOR COMMISSION RULINGS

The Commission has already made determinations regarding the confidential nature of certain categories of Just Energy's business information in the *CUB Complaint* docket and therefore has some basis with which to judge whether the designated material in the Audit Report is deserving of protection from the public record. In response to CUB's opposition to large amounts of material being marked confidential by the Company in the *CUB Complaint*, the ALJ determined that only certain categories of material indeed warrant confidential treatment. *CUB Complaint*, Administrative Law Judge's Ruling of January 6, 2009. Specifically, documents that would likely cause competitive harm by giving Just Energy's competitors insight into its operations to which Just Energy did not have reciprocal access were found to be properly marked as confidential. *Id*. at 3. Similarly, third-party service agreements that could confer a competitive edge on competitors were also properly marked as confidential. *Id*. However,

information regarding contractor training manuals, which contain procedures such as sales approaches that are readily observable by customers and competitors when implemented in the field were determined to not be confidential. *Id*. Likewise, customer service scripts and customer cancellation materials were also deemed not confidential. Information deemed by the Company to be deficient for marketing purposes also confer no competitive edge to competitors and is not confidential. *Id*. at 4.

As in the *CUB Complaint*, CUB did not challenge the confidential designations of material relating to sales agent commissions amounts or incentive programs in the Audit Report. CUB also did not challenge information regarding, for example, Just Energy's internal, proprietary pricing and financial information, salaries and compensation (including the agent commissions). This type of information is in stark contrast, however, to internal complaint handling and marketing material, which does not contain any sensitive financial business information or trade secrets and is readily observable in the market. In the *CUB Complaint*, the ALJ found that no protection was necessary for information regarding "sales approaches and verification procedures, which are readily observable by customers and competitors when they are implemented in the field." *CUB Complaint*, January 6, 2009 ALJ Ruling at 3.

CUB maintains that public dissemination of information for which Just Energy seeks confidential protection will not impede JE's ability to compete fairly or otherwise cause it competitive harm, is not a business roadmap that another company could or would want to follow, and/or is not deserving of protection because the public needs outweigh the protection. In large measure, Just Energy seeks protection for documents that it would rather not be released into the public realm because of the potentially embarrassing nature or other negative impact the material could have on its public perception – not for the unequal competitive advantage

provided to a competitor or substantial competitive harm it may cause. Illinois law simply does not recognize embarrassment as a legitimate basis on which to redact information from the public record. Such information cannot be shielded from public scrutiny simply because Just Energy wishes to keep it secret. *See Baxter Intern. v. Abbott Labs*, 297 F.3d 544, 547 (7th Cir. 2002) ("[M]any litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed.").

3. THE COMMISSION HAS REPEATEDLY DENIED JUST ENERGY'S REQUESTS FOR BLANKET CONFIDENTIAL TREATMENT

The Commission has repeatedly denied Just Energy's requests to prevent publication of the Audit Report to either the public or to CUB. First, the Commission denied Just Energy's request in its Application for Rehearing in the *CUB Complaint* for blanket protection of audit material and the final audit report. *CUB Complaint*, Just Energy's Application for Clarification and Rehearing of the Commission's Order Dated April 13, 2012 (filed May 14, 2012) at 2; Voting Record of Matters Before the Commission, Meeting Date June 2, 2012, Agenda No. PR-1. Second, the Commission denied Just Energy's request for a blanket protective order to restrict all audit-related materials and the audit report from public view. In that Petition, (filed in Docket No. 08-0175, the *CUB Complaint* docket), Just Energy argued that both the Audit Contract and Audit Plan would contain confidential and proprietary information requiring protection. *CUB Complaint*, Just Energy's Verified Petition for Confidential Treatment (filed May 26, 2010) at 4. Just Energy claimed that disclosure of *any* information uncovered in the audit would give its competitors an advantage over the Company. *Id*. Just Energy further stated that it was "deeply concerned" about having confidential information disclosed to CUB. *Id*. at 5. The Commission unanimously denied Just Energy's Petition for Confidential Treatment on June 2, 2010. Voting

Record of Matters Before the Commission, Meeting Date June 2, 2010, Agenda No. G-2. Third, the Commission denied the Company's Petition for Interlocutory Review of the ALJ's ruling in the instant docket granting CUB's request for a protective order, and affirmed that a protective order is appropriate and that CUB should have access to the unredacted report. Voting Record of Matters Before the Commission, Meeting Date April 4, 2012, Agenda No. G-1.

B. JE'S CLAIMS THAT RECENT CASE LAW SUPPORTS CONFIDENTIAL TREATMENT OF THE INFORMATION DESIGNATED ARE WRONG

The Company cites "recent authoritative case law… [which] mandates a broad application of the protection of confidential or proprietary information." Motion at 8. The case cited by JE, *BlueStar Energy Services, Inc. v. Illinois Commerce Commission*, is of little value to the Commission in this analysis, however. 374 Ill. App. 3d 990 (1st Dist. 2007). The exact nature of the information deemed properly protectable in BlueStar is not available, as the court conducted an *in camera* inspection of the information sought in making its determination. *Id*. at 995. Thus, the "broad application" of the court has no context and is simply irrelevant. Additionally, the basic facts of that case are distinguishable from those presented here. In contrast to this case, where the Commission brought a complaint against JE, in *BlueStar*, BlueStar filed a complaint against the Commission and Ameren Corporation asserting that Commission properly denied a FOIA request seeking the disclosure of information designated as confidential in a settlement proceeding between Ameren and a coalition of retail energy suppliers. *Id.* at 991-92, 994.

D. PUBLICIZING JUST ENERGY'S NON-CONFIDENTIAL BUSINESS INFORMATION WOULD NOT HAVE A CHILLING EFFECT IN FUTURE COMMISSION-ORDERED AUDITS

Just Energy argues that the publication of the information in CUB's challenge letter would not only harm the Company, but would likely have a "chilling effect on other companies

that may be subject to Commission audits in the future." Motion at 3. This apparently suggests that regulated entities subject to Commission-ordered management and compliance audits would refrain from providing complete information to an independent auditor, for fear of certain information being publicized. If, however, Just Energy would have refused to provide requested data to the auditor in the conduct of this audit, the Company would have been in dereliction to the requirement in the Commission's *CUB Complaint* Order, requiring it to comply fully and in good faith with the auditor:

> Accordingly, the Commission orders USESC to cooperate fully and in good faith with the auditor and to provide complete access to the Respondent's books, records, offices, and Staff (whether employees or independent contractors), as necessary to conduct the audit in accordance with the Commission's Order, subject to an appropriate confidentiality agreement entered into by and among the company, auditor, and Staff. Failure to do so shall be considered noncompliance with the audit.

CUB Complaint, Final Order at 50. Because Alternative Gas Suppliers ("AGS") like Just Energy, Retail Electric Suppliers ("RES"), and Competitive Local Exchange Carriers ("CLECs") are regulated by this Commission, they subject themselves to the Commission's jurisdiction, orders and statutory requirements in order to do business in this state. Regulated entities subject themselves to Commission authority and jurisdiction and should expect the Commission's rules regarding transparency of its records to be upheld.

D. THE STEPS JE HAS TAKEN TO PROTECT "CONFIDENTIAL" INFORMATION DO NOT DEMONSTRATE THE CONFIDENTIAL NATURE OF THE CHALLENGED INFORMATION

Just Energy further attempts to support its request for confidential treatment of substantial amounts of the Audit Report by claiming that it has taken steps to protect its confidential information. Motion at 8-9. The Company's general statements regarding the measures it takes to protect its confidential information are insufficient on which to base a determination of the

confidential nature of any specific piece of information objected to by CUB for two important reasons. First, the Company's claims of protecting its "confidential" information are so general as to be useless. The Company does not to even attempt to link the claimed arguments regarding confidentiality to specific challenged statements in the Audit Report. Second, the steps Just Energy has taken to protect "the secrecy and confidentiality of its sensitive information" are irrelevant, if that information would not provide unequal advantage to a competitor when made public. The Company's complaint rate is a prime example of this. It is clear that the Company closely guards its internal complaint rate, but for no legitimate purpose other than to hide a clearly embarrassing statistic. The information cannot be considered "trade mark" or proprietary "financial information" under any definition. No competitor could gain a competitive advantage from this information, as it clearly does not provide a roadmap for a successful business (ironically, such information – if it shows anything – demonstrates what a competitor should seek to avoid).

E. PUBLICIZING THE INFORMATION IN JUST ENERGY'S MOTION WOULD NOT CAUSE IT COMPETITIVE HARM

Just Energy's Motion cites to the definition of "trade secret" in the Illinois Trade Secrets Act and argues such definition is "broadly construed." Motion at 10-11. That definition refers to fairly specific categories of information, none of which is represented in the information for which JE requests confidential treatment: formulae, patterns, compilations, programs, devices, methods, techniques, drawings, processes, financial data, or lists of actual or potential customers or suppliers. 765 ILCS 1065/2(d). The Motion then presents six categories of confidential information that the Company argues supports its request, though these categories do not correspond to the cited definition of trade secret. Indeed, it is important to recognize that the relevant Illinois law defining and interpreting "trade secret" does not correspond to broad general

categories, but rather examines whether the publication of that information would cause the producing party competitive harm. Nonetheless, the categories discussed in the Motion are essentially useless to the Commission, because – even the Company would presumably agree – not every piece of information that falls into one of these six categories is deserving of confidential treatment. If that were so, the entire Audit Report would be confidential – a clearly absurd result (though obviously preferable to the Company, considering it has twice asked for such extraordinary protection).

1. The Cases Cited by JE Do Not Support Its Claims Of Confidentiality

Just Energy lists two to three cases under each category that it asserts support its claims, though it provides no contextual facts or even a narrative explanation for why those cases are relevant or on point. Motion at 11. Initially, it should be noted that JE's six categories of confidential information are not the categories defined in the operative protective order. To the extent that the categories of protectable information in the protective order require interpretation, the cases JE cites are so distinguishable as to not provide meaningful interpretation. Most (8 of the 12 cases) actually involve actions of businesses enjoining former employees from disclosing trade secrets to competitors. None of the cases cited are Commission cases, and none deal with an audit required by a regulatory or even public body or are the result of any audit at all much less one conducted by an auditor selected under the state procurement process. Most importantly, the information deemed to be "confidential" in those cases is distinguishable from the information for which JE seeks protection. Each case will be discussed below.

In *PepsiCo, Inc. v. Redmond*, the soft drink manufacturer sought to enjoin a former employee, who had signed a confidentiality agreement, from disclosing trade secrets or confidential information to his new employer, a competing drink manufacturer. The information

at issue included a "Strategic Plan," an annually revised document that included the soft drink company's plans to compete, its financial goals, and its strategies for manufacturing, production, marketing, packaging and distribution for the coming three years. 54 F.3d 1262, 1265 (7th Cir. 1995). This included new beverages to be introduced, including new flavors and package sizes, for coming years. Also at issue was the soft drink company's "Annual Operating Plan," containing the company's financial goals, marketing plans, promotional event calendars, growth expectations, and operational changes for the year. *Id*. The Annual Operating Plan included "pricing architecture," the company's strategy for how to price beverages, including package sizes and other characteristics. *Id*. Unlike the trade secrets at issue in *PepsiCo*, JE does not assert that the information in the audit report includes its pricing strategies, its future marketing plans or future product offerings.

In *Labor Ready, Inc. v. Williams Staffing* (which was incorrectly cited by JE – correct citation is 149 F. Supp. 2d 398), a temporary staffing agency brought suit alleging misappropriation of trade secrets against a competitor and former employees who had signed nonsolicitation, noncompetition and nondisclosure agreements, for use of confidential information and "trade secrets" including customer lists and customer-specific information such as habits and preferences; recruiting and training methods; site selection and compensation models; computer software and hardware; methods and techniques of operation and training; marketing strategies and personnel files. 149 F. Supp. 2d 398, 412 (N.D. Ill. 2001). The court did not explain which types of information it deemed to be misappropriated, simply that "the information plaintiff accuses defendants of misappropriating includes" those categories of information. *Id*. Therefore, JE cannot claim that this case supports its position that its "corporate organization, strategies, business plans, staffing and compensation models" are

protected, as it is unknown whether the court relied on those categories, or on information such as customer lists and customer-specific data in making its determination.

May Centers, Inc. v. S.G. Adams Printing & Stationary Co. involved an action between shopping mall and tenant, where shopping mall sought protection of the agreement with the tenant determining the percentage of community space within the mall tenant allocable to tenant, disclosure of which would diminish shopping mall's ability to negotiate similar agreements with other tenants. 153 Ill. App. 3d 1018, 1019-20 (5th Dist. 1987). There is no discernible correlation between these facts and the information at issue in the Audit Report.

In *APC Filtration, Inc. v. Becker*, the manufacturer of filters and bags of vacuum cleaners brought suit against a former employee and a competitor for misappropriation of trade secrets and violation of employee's employment contract. The confidential and trade secret information deemed protected in that case was, "(1) names and addresses of contact persons of customers, potential customers, and suppliers identified by [plaintiffs]... (2) customer-specific information, such as product preferences and deviated pricing; (3) details of pending sales quotations; and (4) cost and profit margin information for each of [plaintiff's] product lines. *APC Filtration, Inc. v. Becker* 646 F. Supp. 2d 1000, 1009-1010 (N.D. Ill. 2001). JE is incorrect that this case supports protection of "sales, customer numbers, and related data of JE Illinois." *APC Filtration* protects customer-specific information and pricing, but explicitly declined to protect year-to-date sales figures, historical sales information, and product information. *Id*.

In *Roton Barrier, Inc. v. Stanley Works*, the manufacturer of hinges brought an action against a competitor, alleging misappropriation of trade secrets and patent infringement. Information deemed to be "trade secrets" were proprietary manufacturing processes and a proprietary lubrication mixture, and balance sheets, income statements, financial statements and

income tax returns of the plaintiff. 79 F. 3d 1112, 1117-1118 (Fed. Cir. 1996). These facts do not bear any resemblance to the information in the Audit Report challenged by CUB.

In *Liebert Corp. v. Mazur*, the manufacturer of computer network protection equipment brought an action to enjoin former employees from using alleged trade secrets in a new competing business. The confidential information at issue was price books including pricing information that a competitor could use to underbid the plaintiff. *Liebert Corp. v. Mazur*, 357 Ill. App. 3d 265, 284 (1st Dist. 2005). That information is clearly distinguishable from the information for which JE asserts protection.

In *Stampede Tool Warehouse, Inc. v. May*, an automotive tools and equipment distributor brought trade secrets misappropriation action against former employees. The distributor's customer list, including names and telephone numbers of customers, was held to be "trade secret." 272 Ill. App. 3d 580, 589 (1st Dist. 1995). JE's customer lists are not at issue, and this case provides no discussion of, much less support for, protection of "sales and confirmation scripts."

In re Aqua Dots Prods. Liab. Litig. (an unpublished, district court opinion) is a product liability case where defendants, toy manufacturer and retail stores which sold the allegedly defective toy, alleged protocols, procedures and business methods of recalling products were confidential. The court held that they were not. The court held that "Internal business information is not confidential merely because it is "traditionally... private," and that "mere allegations of 'competitive disadvantage' is not enough to show "good cause" for confidentiality. *In re Aqua Dots Prods. Liab. Litig*., 2009 WL 1766776 at *2. It is unclear how JE would even reference this case regarding product recall protocols as support for protection of customer

scripts, but in any event, the court ruled that those protocols were not confidential. This case provides no support for JE's claims.

In *SKF USA, Inc. v. Bjerkness*, a company providing monitoring and maintenance services for factory machinery brought an action against former employees. The court ruled whether particular categories of information were "confidential" under the terms of the employees' employment contracts with plaintiff. The court was careful to note that, while there may be overlap between confidential information in that context and trade secrets, the employment contract afforded broader protection than trade secret law does. *SKF USA, Inc. v. Bjerkness*, 636 F. Supp. 2d 696, 711 (N.D. Ill. 2009). The court found that certain customer-specific information was protectable under the terms of the contract. *Id*. at 713. Training materials, such as certification tests, tips on how to balance a rotor, instructions on how to conduct data analysis, and a manual on manufacturing were also found to be protectable under the terms of the contract, because even though they were compilations of otherwise readily-known facts, the compilations are not available to competitors and presumably have some value by gathering the information into one place. *Id*. at 714. Because this case was evaluated in the context of an employment agreement, the information deemed confidential was broader than what Illinois law may provide. Further, in SKF, former employers had actually taken the training materials with them on personal storage devices. *Id*. at 704. JE's actual certification tests and training manuals are not included in the audit report and are not at issue here. This case is therefore distinguishable on multiple grounds.

In *ISC-Bunker Ramo Corp. v. Altech, Inc*., an information technology installation, repair and servicing company brought an action against a competitor for misappropriation of trade secrets, copyright infringement and interference with employment contract. Information deemed

to be "trade secrets" included software, guides, service manuals, technical bulletins, change orders, product alert notices, schematics, and training manuals and materials. *ISC-Bunker Ramo Corp. v. Altech, Inc*., 765 F. Supp. 1340, 1342 (N.D. Ill. 1990). Again, JE's actual training manuals and materials are not included in the Audit Report and are not at issue here. *ISC-Bunker* does not provide protection for references to the mere existence of such materials, which is the most the Audit Report does.

In *Strata Marketing, Inc. v. Murphy*, a specialized software developer sought injunctive relief against former employee and his prospective new employer. While the plaintiff asserted numerous categories of confidential information (e.g. existing products and products under development, formulas for computing the reach and frequency of radio and television statements, customer contracts, etc.), none of the information alleged by the plaintiff in that case to be confidential was information about customer complaints, which is the proposition for which JE cited this case. *Strata Marketing, Inc. v. Murphy*, 317 Ill. App. 3d 1054, 1057 (1st Dist. 2000).

Muehlbauer v. Gen. Motors Corp. (an unpublished district court opinion) was a product liability class action suit where plaintiffs sought production of customer complaints related to the anti-lock braking systems on certain vehicles. The court granted a protective order, including a provision allowing a party to challenge another's designation of documents as "confidential." *Muehlbauer v. Gen. Motors Corp*., 2009 WL 874511 at *2. Plaintiffs challenged the confidential designation of eleven documents, which were either charts summarizing the rate of specific complaints in different geographic regions or internal evaluation reports regarding the investigation of the anti-lock brake system problem and related documents. The court noted that the eleven documents at issue would not alert unsuspecting vehicle owners to the issue any more than was already public knowledge, and held that "at this early stage" (the class discovery stage),

and in light of the fact that the court was dismissing the case by denying class certification, the documents were "confidential" for purposes of the protective order. *Id*. at *3.

In *Muehlbauer*, the total number of customer complaints was not at issue, nor was the company's process for handling complaints. According to JE Motion Attachment A, those are the types of information for which JE asserts protection under this category. *Muehlbauer*, therefore, provides no guidance as to the information at issue here. There are a few instances where JE asserts this category applies and CUB is unclear on how the information relates in any way to customer complaints. For example, every designation listed on page 34 of JE Motion Attachment A.

2. The Specific Information At Issue Does Not Warrant Confidential Information, Even If It Falls In One of JE's Six Categories

Despite the ineffectual nature of the Company's six "confidential" categories, CUB will examine certain, specific pieces of challenged information in each category to demonstrate that the information CUB challenges does not, in fact, deserve protection from the public record in this proceeding:

Category 1 – Information about the corporate organization, strategies, business plans, staffing, and compensation models of JE Illinois:

- The sufficiency of the Company's management was a central issue in the *CUB Complaint* and the Commission's finding of management insufficiency was used as the basis for requiring this remedial audit. The Commission publicly discussed the general corporate structure of JE throughout its *CUB Complaint* Order and the structure laid out in Chapter III of the Audit Report is nearly identical.
- While the Company may have made small changes to its organizational structure since the conclusion of the *CUB Complaint*, JE fails to mention that the Final

Order in the *CUB Complaint* expressed specific concern about management insufficiency in the state. *CUB Complaint* Final Order at 49, 52. Thus, the auditor evaluation of the Company's management structure should be made public, to ensure transparent compliance with that Order.

- The Commission's Order in the *CUB Complaint* directed that "An incentive structure for employees or agents that rewards reduction of complaints and non-compliances is permissible and encouraged." *CUB Complaint,* Order at 52. Thus, references in the Audit Report to the general compensation and organization of the Company's sales force would demonstrate that this directive was followed and should be public to provide assurance to Illinois consumers that JE is complying with the Commission's requirements.

Category 2 – Information about the sales, customer numbers, and related data of JE Illinois.

- This category appears to be duplicative of other categories. To the extent customer numbers are confidential, the Company waived its right to designate its total, aggregate customer numbers in the *CUB Complaint* docket where it repeatedly publicly disclosed its total customer count.

Category 3 – Information about the sales and marketing strategies, resources, and policies of JE Illinois.

- The Audit Report repeatedly refers to JE's general door-to-door sales approach as an "xxxxxxxx" approach. The fact that the sales agents use this technique in selling JE's products could hardly be more intuitively obvious to any layperson, let alone a competitor. For the same reason, JE uses this technique in the field in soliciting customers, and therefore displays this technique to any potential

customer to whom the sales agent markets. The ALJ in the *CUB Complaint* logically concluded that, sales approaches and verification procedures are "readily observable by customers and competitors when they are implemented in the field." To put this statement in context, a JE sales agent could approach the door of the president or marketing director of its closest competitor – say IGS Energy, for example – who would then be privy to the Company's sales techniques and scripts. Thus, such information is in the public realm and cannot be considered trade mark under Illinois law.

Category 4 – Information about the sales and confirmation scripts of JE Illinois.

- The sales and confirmation scripts used by JE, and changes JE was required to make to those scripts, were discussed at length in the AG-USESC Stipulation, attached hereto as CUB Attachment B (see in particular pages 6-11), and in the *CUB Complaint* Final Order (see pages 50-51). Therefore, the detailed information included in JE scripts is publicly available in multiple places and the Company cannot be harmed by references to the scripts which duplicate that publicly-available information. Additionally, as the ALJ noted in the *CUB Complaint* docket, when the scripts are implemented in the field, they are "readily observable by customers and competitors." *CUB Complaint*, Notice of Administrative Law Judge's Ruling of January 6, 2009 at 3.

Category 5 – Information about the recruiting strategies and activities, training programs and materials, and compensation models of JE Illinois.

- One term that is repeatedly designated throughout the Audit report is "xxxxxxxx," referencing one of many sales training strategies. The notion that the use of xxxx xxxxxxx in training of its door-to-door sales force is some top-secret, confidential

and proprietary business practice that will cause competitive harm to Just Energy if revealed to competitors is utter nonsense. It is the insufficient and ineffective training of its door-to-door sales force that – in part – landed Just Energy in the position of having to defend itself against serious allegations of fraudulent sales conduct in multiple jurisdictions.

- The Company's training methods were the subject of much criticism in the *CUB Complaint* and the Commission discussed this. *CUB Complaint* Final Order at 49. The fact that the Company uses xxxxxxxxxx as part of its training methods to coach door-to-door sales contractors in an attempt to prevent further violations of applicable laws and in complying with other legal requirements (resulting from this Commission's Order in the CUB Complaint proceeding and the USESC-AG Stipulation) is hardly novel, unique or surprising. In fact, such training was arguably done to comply with the requirements established by this Commission the training of its sales agents was insufficient. *Id*., AG-USESC Stipulation at 7. In some ways, it is shocking the Company would attempt to hide this information from the public, considering such a training method – if effective – would demonstrate its willingness and effort to comply with the Commission's directives in the CUB Complaint, the AG-USESC Stipulation and the Illinois Consumer Fraud Act. Nonetheless, such information is in no way trade secret under Illinois law.

Category 6 – Information about customer complaints.

- As pointed out above, there is no cognizable reason that an alternative retail gas supplier's ("ARGs") complaint rate should be provided confidential treatment.

While the Company would like to avoid exposure of its extraordinarily high internal complaint rate, the information cannot be considered "trade mark" or proprietary "financial information" under any definition. No competitor could gain a competitive advantage from this information, as it clearly does not provide a roadmap for a successful business.

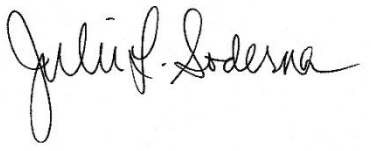
- The Commission devoted significant discussion in its *CUB Complaint* Order regarding the level and nature of complaints and how those complaints translate to management insufficiency. *CUB Complaint*, Final Order at 8-28. The Commission concluded that "Complaints need to be reduced, not merely addressed later." *CUB Complaint*, Final Order at 19. Additionally, the PUA specifically requires the Commission to consider an ARG's Commission complaint rate when examining whether the AGS has maintained managerial resources. 220 ILCS 5/19-112(1) and (2). Thus, complaint data lies at the heart of the audit results and demonstrates whether – or not – the Company has made sufficient changes to its operations to reduce its complaints.
- The evidence in the *CUB Complaint* showed JE's complaint rate at about 2%. *CUB Complaint*, Order at 16. The complaint data in the Audit Report shows this complaint rate to be several magnitudes higher. *See* CUB's Response to Just Energy's Compliance Filing. Even if, as the Audit Report suggests, only xx% of its total customer complaints related to contractor conduct and sales, this complaint rate is significantly higher than what the Commission found to be evidence of management insufficiency in the underlying docket. To maintain the transparency of the Commission's order and the audit that was one of the most

prominent remedies prescribed, information about the Company's complaints during the audit should be public.

III. CONCLUSION

This Commission should be very concerned about the extensive redactions in the Audit Report, considering this was a Commission-ordered remedial audit to examine – and hopefully correct – what the Commission found to be significant violations of Illinois law. The Commission itself cannot even publicly discuss the recommendations that Just Energy claims it will implement, let alone provide the public assurance that the recommendations are indeed being implemented, because of the copious redactions in the final Audit Report. As Staff stated, "it is in the public's interest to have the Audit as publically available as possible in order to provide: (i) other alternative gas providers with management recommendations designed to reduce complaints and to avoid violations of law; and (ii) the public with notice of potential issues with door-to-door sales representations." Staff Response to Just Energy's Compliance Filing and Draft Order at 3. It is appropriate that as much of the Audit Report as possible be made public, especially here, where the auditor was selected under the state procurement process.

Respectfully submitted,



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